MOHD. ZAMBRI MOHD. ARIFFIN

v.

MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ANOR.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CRIMINAL APPLICATION NO. 54-18-88]
10 JANUARY 1989

ADMINISTRATIVE LAW: *Habeas Corpus - Detention under s. 3 of Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Scope & ambit - Validity of grounds - Judicial review of Minister's subjective satisfaction - Preventive detention following acquittal.*

This was an application for a writ of *habeas corpus* following the applicant's rearrest after being acquitted of drug charges by the Tanjung Malim Court on 28 June 1988.

He was detained on the same day under s. 3 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and the Minister of Home Affairs issued the detention order under s. 4(1) of the ordinance on 26 August 1988, having been satisfied that the applicant had been actively engaging himself in continuous activities relating to or involving trafficking of dangerous drugs and that his detention was necessary to prevent him from acting in any manner prejudicial to public order.

The applicant argued *inter alia* that the detention was because of the personal vendetta of a police constable and as such he contended, that there had been an absence of care, caution and a proper sense of responsibility on the part of the Minister in making the detention order and that there was *mala fide* on the part of the authorities. He also argued that there was no proximity of time as between the date of allegation and the date of arrest.

Held:

[1] The mere fact that a subject had been detained under the law as to preventive detention following his acquittal in a Court of law does not necessarily render his detention wrongful.

[2] Where there is specific legislation for the preventive detention of persons associated with any activity relating to or involving the trafficking in dangerous drugs namely the Dangerous Drugs (Special Preventive Measures) Act 1985, it is not proper for the detaining authorities to apply the Ordinance which is meant for preventive detention for securing public order, the suppression of violence and the prevention of crimes involving violence.

[3] The grounds of detention did not fall within scope and ambit of the Ordinance.

[4] Issue of writ of *habeas corpus* ordered and applicant released.

[Application allowed.]

Cases referred to:

Minister for Home Affairs, Malaysia & Anor. v. Karpal Singh [1988] 3 MLJ 29
Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs, Malaysia [1975] 2 MLJ 279
Athappen a/l Arumugam v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors. [1984] 1 MLJ 67
Theresa Lim Chin Chin v. The Inspector General of Police [1988] 1 MLJ 293
Karpal Singh s/o Ram Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor. [1988] 1 CLJ (Rep) 632
Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors. [1976] 2 MLJ 83

Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129
Lawrence Joachim Joseph D'Souza v. State of Bombay [1956] SC 531
G. Sadanandan v. State of Kerala & Anor. [1966] Cri LJ 1533

Legislation referred to:
Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3, 4(1)

For the applicant - Johnny Lim; M/s. Chong, Poh & Lim
For the respondents - Ng Aik Guan, FC of Attorney General's Chambers

JUDGMENT

Abdul Malek Ahmad J:

This is an application by the applicant for a writ of *habeas corpus* supported by his father's affidavit at encl. 2 and his affidavit at encl. 3. The applicant had been detained on 28 June 1988 under s. 3 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (hereinafter "the Ordinance") and for the first 60 days he was detained at the Kuala Kubu Bharu police station.

The relevant affidavits for his further detention beyond 24 hours on 29 June 1988 under s. 3(3)(a), beyond 48 hours on 30 June 1988 under s. 3(3)(b), and beyond 30 days on 23 July 1988 under s. 3(3)(c), of the Ordinance, had been filed as enclosures. 9, 7 and 6 respectively.

The Minister of Home Affairs (hereinafter "the Minster") issued the relevant detention order under s. 4(1) of the Ordinance on 26 August 1988 having been satisfied, from the case file containing the relevant reports and information of the conduct and activities of the applicant, that the applicant had been actively engaging himself in continuous activities relating to or involving the trafficking of dangerous drugs since August 1985 and that his detention was necessary with a view to preventing him from acting in any manner prejudicial to public order.

There is also an affidavit (encl. 8) in reply to the applicant's allegations at paras. 29 to 35 of his affidavit at encl. 3 as regards the alleged personal vendetta of PC 91050 against the applicant which the applicant alleged had resulted in his detention.

Counsel for the applicant had submitted that in view of the affidavit of the applicant, the allegations of fact in the detention order had been proved to be false especially where there had been no specific affidavit to deny the applicant's allegations. In the result, Counsel contends that there had been absence of care, caution and a proper sense of responsibility on the part of the Minister in making the detention order.

He also submitted that there had also *been mala fide* on the part of the authorities in rearresting the applicant on his acquittal of the drugs charge at the Tanjung Malim Court on 28 June 1988. Counsel also argued, although this submission was not on affidavit, that there was no proximity of time as between the date in the allegations of fact and the date of rearrest - the Court is of the view that this argument is devoid of merit as the three allegations of fact are fairly proximate in time.

In the case of *Minister of Home Affairs, Malaysia & Anor. v. Karpal Singh* [1988] 3 MLJ 29, the Supreme Court had made it very clear that the grounds of detention would have to be distinguished from the allegations of fact and has held that unlike the grounds, the allegations of fact upon which the subjective satisfaction of the Minster are based are not open to challenge or judicial review and are therefore beyond the jurisdiction of any Court to inquire into them.

This Court is also of the opinion that the mere fact that a subject had been detained under the law as to preventive detention following his acquittal in a Court of law does not necessarily render his detention wrongful. In the well reasoned judgment in *Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs, Malaysia & Ors.* [1975] 2 MLJ 279 where the applicant for a writ of *habeas corpus* had been discharged on a murder charge before his detention, Aboolcader, J (as he then was) had held that an order of detention is not illegal merely because it nullifies a previous order of discharge or acquittal by a Court in a criminal case. A number of Indian, English and Irish cases had also been cited in the process. This had also been followed in *Athappen a/l Arumugam v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.* [1984] 1 MLJ 67.

Accordingly, having considered the arguments, the authorities and the affidavits, I was of the view that the numerous affidavits filed by the respondents had in fact categorically denied the allegations of the applicant in his affidavit. Considered together with the principle that the Court cannot question the subjective satisfaction of the Minister as regards the allegations of fact and the ruling that a detention after a discharge or acquittal in a Court of law does not render it unlawful, the applicant would appear to be facing an uphill task in securing his release.

However, as has been held in *Theresa Lim Chin Chin v. The Inspector General of Police* and followed in *Karpal Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor.* and in *Athappen's* case, the only grounds open for challenge in an application for *habeas corpus* are *mala fides*, non-compliance with a condition precedent for the making or the continuance of the order of preventive detention or that it is not within the scope and ambit of the relevant legislation.

Consequently, in the present application, this Court, is of the considered view that since the grounds for detention and the supporting affidavits of the respondent have stated that the applicant was a trafficker in dangerous drugs herein which activity had resulted in the increase in criminal activities related to violence and consequently he had acted in a manner prejudicial to public order, it is open for the Court to hold that these grounds read with the three allegations of fact do not actually fall within the scope and ambit of the Ordinance, as the preamble states that in view of the existence of the grave emergency threatening the security of the country, the particular Ordinance had been enacted as the Yang Di-Pertuan Agong had been satisfied that immediate action is required for securing public order, the suppression of violence and the prevention of crimes involving violence.

The Court is of the opinion that where there is specific legislation for the preventive detention of persons associated with any activity relating to or involving the trafficking in dangerous drugs namely the Dangerous Drugs (Special Preventive Measures) Act 1985 (hereinafter "the Act"), it is not proper for the detaining authorities to apply the Ordinance which is meant for preventive detention for securing public order, the suppression of violence and the prevention of crimes involving violence. The three allegations of fact only suggest that the applicant's drug trafficking activity had resulted in the breach of public order, violence or crimes involving violence despite what has been liberally set out in the grounds. For ease of reference, the allegations of fact are:

1. Bahawa kamu adalah seorang pengedar dadah heroin yang bergiat di sekitar kawasan Simpang Tiga Felda Suharto, Gandangsa, Hulu Selangor, Selangor sejak bulan Ogos 1985.
2. Bahawa Kamu mengedar dadah heroin dalam bentuk tiub dengan harga di antara RM9 - RM10 satu tiub.
3. Bahawa kamu dalam masa sehari mampu mengedar sebanyak di antara 5 - 6 tiub dadah heroin kepada pelanggan-pelanggan tempatan.

The English translation reads:

1. That you are a heroin trafficker who is active throughout the area of Simpang Tiga, Felda Suharto, Gadangsa, Hulu Selangor, Selangor since August 1985.

2. That you are trafficking heroin in the form of tubes at a price of between RM9 - RM10 per tube.

3. That you are able to traffic a total of between 5 - 6 tubes of heroin in a day to the local customers.

This reasoning, however, has to be viewed in the light of the finding in *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.* where in another well-reasoned judgment Abdoolcader, J (as he then was) had candidly commented as follows:

> Applying the norms and principles enunciated in the selection of cases I have adumbrated (which are by no means exhaustive on the topic under consideration) and with which I wholly agree and would respectfully adopt, it is abundantly clear that trafficking in drugs as a member of an international drug distribution syndicate which is the ground on which the order of detention against the applicant was made strikes at the very core of public order and any person indulging in such activities must necessarily be acting in a manner prejudicial to public order. It is not necessary to elaborate on the deleterious effects of drugs. Trafficking in drugs is a crime which also affects public health and public safety and can indeed be the spawn or nidus of crimes that ultimately result in violence or at least leave a shattering effect on public tranquility and society generally.
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> The issue involved in this matter was in fact raised recently in *P.E. Long et al. v. Menteri Hal Ehwal Dalam Negeri, Malaysia & 2 Ors.* before Arulanandom, J, when he decided that detention for trafficking in drugs is within the purview of the Ordinance. I have approached and considered the question in issue independently and have come to the same conclusion.
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> I am accordingly of the view that the ground on which the order of detention was made against the applicant, namely, trafficking in drugs, is within the scope and ambit of the Ordinance and that the contention to the contrary raised on behalf of the applicant is ill-founded, and I would in passing express the hope that my judgment in this matter will have served a purpose, if for nothing else, at least perhaps in providing a sufficient contraceptive against the proliferation of like applications for *habeas corpus* founded on the identical contention.

I am in full agreement with the reasons stated as the matter stood then but that was in May 1976 some nine years before the Act came into force. With respect, the position cannot be the same today. To decide otherwise would certainly mean to question the wisdom of the executive and the legislature in holding that the Act was necessary in the midst of the country's present battle with the drug menace.

Consequent upon the finding that the grounds of detention stated in the detention order did not fall within the scope and ambit of the Ordinance, the Court had accordingly held that the wrong legislation had been applied and on that ground alone ordered the issue of the writ of *habeas corpus* and directed the respondents to release the applicant forthwith.

Also found at [1989] 1 CLJ 797